UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. **AMERICAN BAR ASSOCIATION**, Defendant.	Civil Action No. 95-1211(CR) Filed: June 27, l995

COMPETITIVE IMPACT STATEMENT

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16 (b), the United States submits this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry with the consent of defendant American Bar Association ("ABA") in this civil antitrust action.

I.

NATURE AND PURPOSE OF THE PROCEEDING

A. The Complaint

On June 27, 1995, the United States filed a civil antitrust suit alleging that the ABA violated Section 1 of the Sherman Act in its accreditation of law schools. The Complaint alleges that the ABA restrained competition among professional personnel at ABA-approved law schools by fixing their compensation levels and working conditions, and by limiting competition from non-ABA-approved schools. The Complaint also alleges that the ABA allowed its law school accreditation process to be captured by those with a direct interest in its outcome. Consequently,

rather than setting minimum standards for law school quality and thus providing valuable information to consumers, the legitimate purposes of accreditation, the ABA at times acted as a guild that protected the interests of professional law school personnel.

The United States and the ABA have agreed that the proposed Final Judgment may be entered after compliance with the Antitrust Procedures and Penalties Act. Entry of the Final Judgment will terminate this civil action, except that the Court will retain jurisdiction for further proceedings that may be required to enforce or modify the Judgment, or to punish violations of any of its provisions.

B. Law School Accreditation

The Section of Legal Education and Admissions to the Bar ("Section of Legal Education") administers law school accreditation. It was created in 1893 as the first Section of the ABA and assumed the role of an accrediting agency in 1921.

ABA approval is critical to the successful operation of a law school. The bar admission rules in over 40 States require graduation from an ABA-approved law school in order to satisfy the legal education requirement for taking the bar examination. In addition, the ABA is the only agency recognized by the United States Department of Education as a law school accrediting agency.

In 1973, the ABA adopted its current Standards for the Approval of Law Schools ("Standards"), setting forth the minimum

requirements for legal education that must be met to obtain and maintain ABA approval. Law schools were required to be in full compliance with the Standards commencing with the 1975-76 academic year. The Standards and their Interpretations covered many aspects of the operation of a law school, including its salary structure, student-faculty ratios, faculty leave policies, faculty workloads, and physical facilities.

The Section of Legal Education is governed by its Council, which has supervisory authority on all accreditation matters. The Council has established a Standards Review Committee that reviews the Standards and their "Interpretations" and recommends changes to the Council. The Council has also established an Accreditation Committee, which closely oversees the inspection of new law schools and the sabbatical reinspections of previously approved law schools, and makes the initial recommendations regarding ABA approval.

The Accreditation Committee enforces the Standards through extensive on-site inspections of law schools. Provisionally approved law schools are inspected every year until receiving full approval, and fully approved law schools are inspected every seven years, except for an initial visit three years after first gaining full approval. Site inspection teams prepare detailed reports for the Accreditation Committee. The Accreditation Committee may "continue" the accreditation of an approved law school, require additional information from a law school in actual or apparent non-compliance with the Standards or about

whom the Accreditation Committee has "concerns," or require a show cause hearing for law schools in apparent non-compliance with the Standards or their Interpretations.

The day-to-day operation of the ABA's accreditation process is directed by the ABA's Consultant on Legal Education. The Consultant prepares "Action Letters" that inform the law school deans and university presidents of the Accreditation Committee's findings and conclusions.

II.

DESCRIPTION OF THE PRACTICES INVOLVED IN THE ALLEGED SHERMAN ACT VIOLATION

At trial, the United States would have proved the following:

A. Anticompetitive Standards And Practices

1. Capture Of The Accreditation Process. Legal educators, including current and former law school deans, faculty, and librarians, control and dominate the ABA's law school accreditation process. Approximately 90% of the Section of Legal Education's members are legal educators. In substantial part, this is because of the Section of Legal Education's Faculty Group Membership Program, under which ABA-approved law schools may obtain a group discount on dues for their faculty. Many law schools pay their faculty's dues and the faculties of about 145 of the 177 ABA-approved law schools hold ABA membership through the Faculty Group Membership Program.

All current members of the Standards Review Committee and a majority of the current members of the Accreditation Committee are legal educators. The typical site inspection team has 5-7 members, all or nearly all of whom are legal educators. The Consultant's position has traditionally been held by a legal educator. The incumbent has served as Consultant for over 20 years and is a former dean and a current law school faculty member.

2. Professional Staff Compensation. ABA Accreditation Standard 405(a) required that faculty compensation be comparable with that of other ABA-approved schools. In practice, this Standard was extended to cover deans' and professional librarians' salaries. The ABA collected extensive, detailed salary information, among other data collected, in annual questionnaires that ABA-approved law schools were required to complete. Often, the comparable schools consisted of a "peer group" of schools chosen by the professional staff of the inspected school. The "peer group" could be and at times was manipulated to include higher-rated law schools or law schools located in higher-cost areas. Law schools also at times were placed on report under Standard 405(a) by the Accreditation Committee because of unfavorable salary structure comparisons, not because of poor faculty quality.

3. Boycotts of non-ABA-approved schools. The ABA prohibited an ABA-approved school from granting any transfer credits for courses successfully completed at state-accredited or

unaccredited law schools, but permitted a law school, under certain conditions, to allow credits for courses taken at a foreign law school (Standard 308 and its Interpretation). The ABA also prohibited ABA-approved law schools from matriculating graduates of state-accredited or unaccredited law schools, but permitted, under certain circumstances, the matriculation of graduates of foreign law schools (Interpretation 3 of Standard 307). The ABA rejected a 1979 amendment that would have allowed law schools the discretion to admit any bar members to their graduate programs. In practice, the ABA permits only the law school, and not the affected individual, to apply for a waiver of the Interpretation, and such applications have been denied. Standard 202 prohibited the accreditation of proprietary law schools. The ABA has never approved a proprietary law school and the Accreditation Committee twice recommended against approval of one proprietary law school.

These Standards, Interpretations, and their application have unreasonably restricted competition in the market for the services of professional law school personnel. The salary Standard and its application had the effect of ratcheting up law school salaries. The Standard relating to proprietary law schools erected an unnecessary barrier to competition from these schools, which often provide their professional staff with lower salaries and fewer amenities than do ABA-approved schools. The restrictions on enrolling graduates of non-ABA-approved schools, and on offering transfer credits for course work completed at

those schools, were unreasonable restraints of trade aimed at deterring effective competition from law schools that are likely to pay less in salaries and benefits to their professional staffs.

B. Other Accreditation Standards And Practices

4. Student-To-Faculty Ratios. In its Interpretations of Standards 201 and 401-405, the ABA declared that a student-to-faculty ratio of 20:1 or less is presumably in compliance with its accreditation standards but that a faculty ratio of 30:1 or more is not. While the Interpretation counts a part-time student as two-thirds the equivalent of a full-time student, the ABA has counted only full-time, tenure-track professors as "faculty," thereby excluding from the count administrators who teach, emeritus or senior faculty who teach, some visiting professors, joint-appointed faculty (faculty holding appointments in two departments in a university) who teach, adjunct professors, clinical and other instructors holding short-term contracts, and tenured faculty teaching part-time because of family responsibilities. Although part of the policy supporting reduced student-faculty ratios is the desirability of smaller classes and increased student-faculty contact, the ABA did not measure actual class size or effectively measure actual student-faculty contacts. The growth of full-time faculty at ABA-approved law schools substantially exceeded the growth of student enrollment at such schools in the past 10 years.

5. Teaching Loads. Standard 404 sets a maximum 8-hour-per-week teaching load or, if a course is duplicated, a 10-hour load. In practice, an hour was defined as 50 minutes.

6. Compensated Leaves Of Absence. Standard 405(b) required that faculty members be afforded a "reasonable opportunity for leaves of absence and for scholarly research." In some instances, this Standard has been applied in practice to require paid sabbaticals, summer stipends, and other forms of research compensation.

7. Bar Preparation. While Standard 301 requires a law school to maintain an educational program designed to qualify its students for admission to the bar, Standard 302(b) prohibits a law school from offering a bar preparation course for credit or requiring one for graduation, even for students identified as being at risk of failing the bar examination. A bar preparation course cannot be offered as a required course, even when a law school meets the ABA minimum credit requirements without counting the bar preparation course.

8. Facilities. Standard 701 requires an "adequate" physical plant. Nearly all ABA-approved law schools occupy new facilities or have made substantial renovations to existing facilities since the new Standards were adopted in 1973. Despite this, over one-third of all ABA-approved schools were put on report for "inadequate facilities" by the Accreditation Committee in 1994, including law schools of recognized distinction.

9. Resources. Standard 201 requires that a law school have the necessary resources to provide a sound legal education, and Standard 209 requires adequate resources to sustain a sound educational program. These Standards have been applied at times by the Accreditation Committee to place law schools on report for alleged shortcomings. In 1994, about 50 law schools, including many of recognized high quality, were on report for allocating inadequate resources to their law school program.

Some of the Standards, Interpretations, and other factors described in paragraphs 4 through 9 may reflect relevant considerations in assessing the quality of a law school's educational program. At times, however, they too have been applied inappropriately to restrict competition in the law school labor market.

III.

EXPLANATION OF THE PROPOSED FINAL JUDGMENT

Prohibited Conduct. The proposed Final Judgment prohibits the recurrence of conduct that is plainly anticompetitive. Specifically, the Final Judgment will eliminate the adoption or enforcement of any Standard, Interpretation or Rule, or the taking of any action that imposes requirements as to the base salary, stipends, fringe benefits, or other compensation paid to law school faculty, administrators or other law school employees. The Final Judgment also will eliminate the collection or dissemination of compensation data for deans, administrators,

faculty, librarians, or other employees, and the use of compensation data in connection with the accreditation of any law school. In addition, the Final Judgment eliminates any Standard, Interpretation or Rule prohibiting the enrollment of a member of a bar or a graduate of a state-accredited law school in a post-J.D. program, or the acceptance of any transfer credits from state-accredited law schools. The ABA is also prohibited from accrediting only law schools organized as not-for-profit institutions.

Additional Relief. The proposed Final Judgment also contains structural provisions to ensure that the law school accreditation process is governed by persons other than those with a direct economic interest in its outcome and that the process is brought more into public view. As the Complaint states, it is the view of the United States that during the past 20 years, the law school accreditation process has been captured by legal educators who have a direct interest in the outcome of the process. Most of the process, as it applied to individual law schools, was carried out by the Accreditation Committee and the Consultant's office and was kept from public view and the supervision of the ABA's Board of Governors and House of Delegates. In addition, the individuals who served on the Accreditation Committee and in the Consultant's office had been in these positions for many years. Finally, the Interpretations of the accreditation Standards were in some cases more plainly anticompetitive than the Standards themselves, yet their adoption

was not subject to the same public comment and hearings requirements as amendments to the Standards.

Accreditation matters for individual law schools often remained before the Accreditation Committee because it required repeated reports from law schools under review, thereby lengthening the accreditation process. At one point in 1994, 56% of ABA-approved law schools were under continuing Accreditation Committee review and 16% more were undergoing sabbatical reinspections that school year.

As remedies, the proposed Final Judgment provides:

1. Proposed Interpretations will be subject to the same public comment and hearings requirements as proposed Standards. All proposed Interpretations, Standards, Rules, and Policies must be published annually in the ABA Journal and the Review of Legal Education in the United States.

2. Law schools may take immediate appeals to the Council from adverse Accreditation Committee Action Letters. The Accreditation Committee must also report to the Council following each meeting all accreditation actions that it took during the meeting.

3. Elections to the Council will be subject to the Board of Governors' approval, no more than 50% of the Council membership may be law school deans or faculty, and members will be subject to a two-term limit. Only 40% of the members of the Nominating Committee may be law school deans or faculty.

4. Appointments to the Accreditation Committee will be subject to Board approval. No more than 50% of the Accreditation Committee may be law school deans or faculty, and members will be subject to a two-term limit. The same requirements apply to the Standards Review Committee, except that its members are limited to one term.

5. To the extent reasonably feasible, accreditation site inspection teams will include at least one practicing lawyer, judge or public member, and one non-law school university administrator. The ABA will annually publish the names of those who participated in domestic and foreign site inspections and the schools they inspected.

6. The Council must annually report to the Board on its accreditation activities, including identifying all schools under accreditation review and the reasons the law schools are under review.

7. The Council must approve, and the Board review, all annual and site inspection questionnaires sent to law schools.

8. By October 31, 1995, the ABA will hire an outside independent consultant, who is not a legal educator, to assist in evaluating the ABA's accreditation Standards and Interpretations and develop a plan for their validation by December 31, 1995.

Special Commission. The ABA has established a Special Commission To Review The Substance And Process Of The ABA's Accreditation Of American Law Schools. A number of subjects of the accreditation process raise legitimate educational policy

issues, but were applied at times to achieve anticompetitive, guild objectives, as discussed in Section II above. These subjects are: faculty teaching-hour requirements; compensated and other required leaves of absence for faculty and other staff; the manner in which the ABA calculated the faculty component in calculating student-faculty ratios; physical facilities; the allocation of resources to the law school; and bar preparation courses. The Special Commission will review these subjects and report to the Board of Governors no later than February 29, 1996. Upon completing its review, the Board will file its report with the United States and the Court. The United States may challenge any proposal in the report within 90 days of the Commission's report. Any such challenge will be decided by the Court applying an antitrust analysis. This is novel relief in a government antitrust case, resulting from a recognition that some accreditation practices implicate both antitrust and educational policy concerns. Since the ABA had initiated the Special Commission in response to academic criticism of its accreditation process and its perception of possible antitrust problems, the United States has agreed that the ABA may first attempt to reconcile antitrust and educational concerns through its Special Commission.

IV.

REMEDIES AVAILABLE TO PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of such actions. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the Judgment has no prima facie effect in any subsequent lawsuits that may be brought against the defendant in this case.

V.

PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED JUDGMENT

As provided by the Antitrust Procedures and Penalties Act, any person believing that the proposed Final Judgment should be modified may submit written comments to John F. Greaney, Chief, Computers and Finance Section, U.S. Department of Justice, Antitrust Division, 555 4th Street, N.W., Room 9903, Washington, D.C. 20001, within the 60-day period provided by the Act. These comments, and the Department's responses, will be filed with the Court and published in the Federal Register. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to entry. The proposed Final Judgment provides that the Court retains jurisdiction over this action,

and the parties may apply to the Court for any order necessary or appropriate for modification, interpretation, or enforcement of the Final Judgment.

VI.

DETERMINATIVE MATERIALS/DOCUMENTS

No materials or documents of the type described in Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b), were considered in formulating the proposed Final Judgment.

VII.

ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered other relief in addition to the remedies contained in the proposed Final Judgment. In particular, early in the investigation, the United States proposed injunctive relief eliminating: the ABA's prohibition of credits for a bar review course; the ABA's practice of attributing no value to teachers other than full-time tenure-track faculty in calculating student-faculty ratios; the maximum teaching hour limits; the faculty leave of absence requirements; and the requirement that substantially all first-year courses be taught by full-time faculty. Later the United States proposed other relief, all of which is included in the proposed Final Judgment. The United States made these proposals during the negotiating process as its investigation proceeded and as it

learned more about the ABA's practices and their competitive effects.

The United States eventually concluded, on the basis of the evidence it had gathered, that mere amendment of the ABA's Standards and practices would not provide adequate or permanent relief and that reform of the entire accreditation process was needed. While a prohibition of some of the rules was warranted, as is accomplished by the proposed Final Judgment, the larger and more fundamental problem of regulatory capture also had to be addressed.

Moreover, a number of the Standards, Interpretations and practices at issue, although sometimes misapplied to further guild interests in the past, concern matters of legitimate educational concern. The United States concluded that appraisal of whether the provisions and practices listed in Section IV.D of the Complaint are anticompetitive or set a procompetitive minimum educational standard for law school programs should be made in the first instance by the ABA itself, subject to subsequent review. The United States agreed to submit the first four of the practices initially of most concern to it, along with others about which it had developed concern, to review by the ABA's Special Commission. (In the case of first-year teaching requirements, on the basis of evidence it subsequently gathered the United States abandoned its initial opposition.) If the Special Commission fails to consider adequately the antitrust implications of continuing the ABA's past practices in these

areas, the Final Judgment permits the United States to challenge the Special Commission's proposals and seek further injunctive relief from the Court.

The United States had also earlier proposed that the ABA's Special Commission be separately constituted as an antitrust review committee whose membership would be one-third practitioners, judges, and public members; one-third non-law school university administrators; and one-third law school administrators and faculty. Although the Government recognized that a number of members of the Special Commission had participated in the accreditation process in the past, it also considered that the Special Commission was already constituted and had progressed in its work, that ABA leadership was now familiar with and sensitive to antitrust concerns, and that the Commission report was subject to challenge by the United States and review by the Court.

Another alternative to the proposed Final Judgment is a full trial of the case. A trial would involve substantial cost both to the United States and to the defendant, and is not warranted

since the Final Judgment provides all substantial relief the Government would likely obtain following a successful trial.

Dated: July 14, 1995

Respectfully submitted,

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CERTIFICATE OF SERVICE

On July 14, 1995, I caused a copy of the United States' Competitive Impact Statement to be served by facsimile and first-class mail upon:

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